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ABSTRACT

This paper examines the impact and implications for the nation's 104 historically black colleges and universities (HBCUs) of the final regulations published in the April 29, 1994 "Federal Register" and traces both the legislative and regulatory history of Part H of the Higher Education Act provisions. The analysis addresses specific issues, including the following, which cause HBCUs the greatest concern: (1) the use of cohort default rates and percentages of institutional budgets and educational and general expenditures composed of Title IV funds to target institutions for state review; (2) the method of calculating cohort default rates, which ignores "dollars in default" and severely penalizes smaller, lower cost colleges and universities; and (3) the delegation of unreviewable authority to the states to permit them to terminate institutional access to a Federal program. Finally, the analysis makes reference to other regulations, especially the Procedures and Criteria for Recognition of Accrediting Agencies (59 Federal Register) that were published in final form on April 29, 1994. General Provisions (59 Federal Register) are also presented. (GLR)

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ED 374 168

July 14, 1994

"IMPLEMENTING PROGRAM INTEGRITY FROM AN HBCU PERSPECTIVE: PROGRESS, PROBLEMS AND PROSPECTS"

An Analysis of Part H, Program Integrity - TRIAD of the Higher Education Act and the Final Rules and Related Interim Final Regulations Published in The Federal Register on April 29, 1994

The U.S. Department of Education (USED) published Final Regulations in the Federal Register on April 29, 1994 governing the implementation of the State Postsecondary Review Entity (SPRE) program. These regulations finalize the Notice of Proposed Rulemaking which was published for public comment on January 24, 1994, and will become effective on July 1, 1994, **except for those provisions in** 34 CFR 667.3, 667.4, 667.8, 667.12, 667.15, 667.21, 667.22 and 667.26. The implementation of these provisions is delayed pending review by the Office of Management and Budget (OMB) under The Paperwork Reduction Act.

This analysis of the impact and implications for the Nation's 104 Historically Black Colleges and Universities (HBCUs) 1/ of the Final Regulations published in the April 29, 1994 Federal Register traces both the legislative and regulatory history of the Part H, Higher Education Act provisions. 2/ It was prepared for the June 12-13, 1994 meeting of the United Negro College Fund (UNCF) Presidents, for the July 14, 1994 UNCF Presidents/TRUSTEES Seminar, and for publication as part of the proceedings of the 19th Annual Conference "Blacks in Higher Education," by the National Association for Equal Opportunity in Higher Education (NAFEO). While parts of the analysis concentrate on the specific application of Part H to private HBCUs, it is nevertheless applicable to the entire HBCU community, and to the larger higher education community insofar as the analysis addresses specific issues, including -- (1) the use of cohort default rates and percentages of institutional budgets/educational and general expenditures composed of Title IV funds to target institutions for state review; (2) the method of calculating cohort default rates which ignores "dollars in default" and severely penalizes smaller, lower cost colleges and universities; and (3) the delegation of **unreviewable authority** to the states to terminate institutional access to a federal program.

The analysis is intended to form the backdrop for both legislative and regulatory reform. It is the view of many in the black college community, and in the larger higher education community, that the effort made in the negotiated rulemaking sessions, i.e. to substantially modify certain onerous provisions in the NPRM, was simply beyond the scope of the rulemaking process.

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The remedy sought in the regulation writing process was simply not available due to statutory constraints.

Finally, this analysis makes reference to other regulations, especially those Procedures and Criteria for Recognition of Accrediting Agencies (59 Federal Register 82, pp. 22250-22276) which were published in final form on April 29, 1994 as well. Comment and analysis on the Interim Final Regulations affecting the General Provisions (59 Federal Register 82, pp. 22348-22459) also appear in this document.

While the U.S. Department of Education (USED) did exceed -- in a number of instances -- its statutory authority in drafting certain portions of the Notice of Proposed Rule Making (NPRMs), 3/ and the Final Rule, the most severe problems affecting HBCUs are in the statute, not the regulations.

The provisions in Part H which cause the greatest concern to HBCUs are: (1) the use of cohort default rates to target institutions review by the State Postsecondary Review Entity (SPRE) because default rates disproportionately target HBCUs because of the low income, minority students they enroll; (2) the present method of calculating "cohort default rate" unfairly singles out smaller, private institutions for State review because it compares the number of students who fail to enter re-payment to those scheduled to enter repayment -- while ignoring dollars in default, entirely; and (3) the delegation of the authority to the SPRE to terminate institutional participation in a Federal program, without providing for Secretarial review of the State's determination.

HBCUs, especially private black colleges and universities, may be more threatened today by Part H and the implementing regulations, than they ever have been due to the excessive reliance of lower income students on Federal Family Education Loans (FFELs) and federal policies which link high student loan default rates to institutional participation in Title IV. Since HBCU students disproportionately on Pell Grants, College Work Study and the various loan programs, the potential devastation caused by institutional exclusion is real. For example, 61 percent of all UNCF students receive Pell Grants and 61 percent receive FFELS. 4/

Student reliance on loans to pay college costs has increased dramatically over the last decade plus. Among UNCF member institutions, student borrowing in the Guaranteed student Loan Program grew from $4,139,201 in AY 1979-80 to $56,808,000 in 1989-90 -- a **sixteen-fold increase**. 5/ In 1991-92, the most recent year for which data is available, students attending UNCF member institutions borrowed $83,429,000! 6/ This trend in increased borrowing among lower income, minority students is not restricted

to UNCF students -- having been pre-ordained by 1981 changes in the needs analysis affecting the Guaranteed Student Loan Program.

In fact, both the Congressional Budget Office (CBO) and the American College Testing Service (ACT) have called attention to extensive borrowing among low income and minority students. 7/

The increasing irony of Congress' insistence on reductions in student loan defaults, while it consistently fails to fulfill its commitment with respect to funding the Pell Grant maximum is disturbing. The Congress' failure to appropriate the funds necessary to pay the Pell Grant maximum award to the poorest students **concomitantly** either compels more and more lower income students to borrow to pay college costs, or denies them access to a college education altogether. Since the Pell Grant (formerly Basic Educational Opportunity Grant) program was fully funded in 1974, Congress has appropriated sufficient funds to pay the maximum award **only three times**. Instead of the current $2,400 maximum, the award level should be approximately $4,500.

Institutions which assist the Federal and State governments in carrying out their "access" and equal opportunity objectives, i.e. the HBCUs, community colleges, urban four-year institutions, etc. tend to enroll significant numbers of academically "at-risk," students who may be less well prepared to do college level work. The result of serving as an institutional 'partner' may be to be assigned a higher than normal "cohort default rate," due to the failure of these "at-risk" students to persist through to graduation.

A second, even more severe result, may be to be excluded from the FFEL program or the Title IV programs in their entirety. The inappropriate use of cohort default rates is most evident in Part H. While there is little doubt that the use of such rates may be helpful in predicting institutional behavior/management of the FFEL program, even the Department's own publication "Reducing Student Loan Defaults -- A Plan for Action," identified "unemployed and without income" as the two principal reasons for student loan default. 8/ In fact, three of the four major characteristics of defaulters are personal to the borrower and no relationship to institutional management of Title IV funds.

The continued use of cohort student loan default rates indiscriminately identifies innocent institutions of higher education, while failing to accurately target problem institutions. It is reasonably clear that mismanagement of federal and institutional resources is not a factor exclusively identified with any sector within the higher education community. 9/ Cohort default rates do, however, tend to identify smaller institutions,

with large numbers of lower income students in their enrollment. Since alternate criteria are available which would allow USED to screen out or identify "problem schools," the existing criteria which disproportionately target HBCUs, cannot be defended under the Constitution or Title VI of the Civil Rights Act.

The legislative and statutory reform required does not, in any way, seek to reduce the Federal regulation and oversight required to adequately perform the "gate-keeping" function and to protect the taxpayer's interest. The HBCU community is on record in support of sound institutional management of Title IV, Student Assistance funds and the performance **by HBCUs** of their fiduciary responsibilities with respect to these monies. Restricting institutional access to Title IV for those postsecondary institutions which lack the administrative capacity and financial responsibility to efficiently and effectively administer tax dollars is critical to ensuring the integrity of the Title IV programs and to assuring institutional accountability for resources appropriated by Congress.

Articulating clear, definable standards related to institutional management of Title IV programs; holding institutions responsible for managing Title IV programs; and then effectively monitoring those institutions which have demonstrated an inability to administer Title IV programs **does not require the use of a dragnet**. Specific criteria which denote fraud, waste and abuse will allow the Federal Government to identify so-called "bad schools" without punishing innocent victims. Quality USED staff work on the front end, and on-site visits **before** institutional access is granted will protect everyone's interest.

The HBCU community should not advocate for a lesser standard of institutional integrity, nor should it seek to avoid oversight and accountability. Being perceived as being above compliance or seeking to avoid compliance with legitimate Part H standards will erode political support for statutory reform.

LEGISLATIVE UNDERPINNINGS OF THE ISSUES OF PRIMARY CONCERN TO HISTORICALLY BLACK COLLEGES AND UNIVERSITIES

Part H and these proposed rules -- which had been the subject of "negotiated rule-making" pursuant to section 492 of the Act -- reallocated the historic roles and responsibilities of the TRIAD members in a way which conflicts with the law (Title VI of the Civil Rights Act) and the Constitution (Equal Protection Clause), and compromises the academic purpose of all institutions. Most particularly, Part H threatens the special mission of Historically Black Colleges and Universities (HBCUs).

HBCUs strongly supported the stated purpose of Congress' enactment of the Program Integrity - TRIAD provisions, i.e. to provide a statutory framework for eliminating fraud, abuse and waste in the Title IV, Student Assistance programs. Historically, each TRIAD member had acted independently, even though their independent actions affected the Title IV eligibility of institutions. Despite the relationship of accreditation and state licensure to Title IV eligibility -- the regional/national accreditation function was never designed to monitor Title IV compliance, much less control student loan defaults. Neither was state licensure intended as a substitute for accreditation's performance of its quality assurance role. However, Part H and the proposed rules, have confused and muddied the roles and responsibilities of the TRIAD members. Hence, Part H is fundamentally flawed for several reasons.

First, the roles and responsibilities of the TRIAD members, and the Federal versus the State role have been confused. The States or State Postsecondary Review Entities (SPREs) have assumed qualitative assessment and peer review tasks in which they have no prior experience nor expertise. TRIAD entities have been granted duplicative and overlapping responsibilities -- creating burdensome and intrusive actions and activities which the institution must shoulder and respond too. Instead of assigning specific responsibilities to a single entity -- accrediting bodies are asked to make financial aid judgements and state agencies are required to make qualitative judgements about curricula, faculty, and learning resources at institutions of higher education.

Second, SPREs have been granted **unreviewable termination** authority over institutional participation in a Federal program. Procedural protections for the institutions are not stated in the statute and were somewhat unclear in the NPRM. Equally important, viewed from and HBCU perspective, southern states with documented records of discrimination with respect to black colleges have been granted a tool -- notwithstanding Adams and the Equal Protection Clauses -- to terminate HBCUs from the Title IV, Student Assistance program!

Finally, criteria have been adopted -- and used to target institutions for state review -- which appear to bear some relationship to institutional non-(mis)management of Title IV funds, but which bear no rational relationship to an institution's capacity to manage Title IV programs or account for federal monies. In particular, student loan default or cohort default rates have been adopted as surrogates for institutional mismanagement, rather than as indices of student/family financial status, inadequate student preparation at the elementary-secondary level for college and failure to persist in the academic arena to graduation. More

critically, cohort default rates distort even what they do measure -- severely punishing smaller schools with few dollars in default, but higher "rates of default -- and ignoring institutions with a large dollar volume in default.

MAJOR REGULATORY ISSUES

(I) INSTITUTIONAL REVIEW CRITERIA -- Colleges and universities may be **referred** to a State Postsecondary Review Entity (SPRE) for review pursuant to the criteria in section 667.5. All SPREs must secure USED approval to initiate their reviews by September 1995 and the SPREs are expected to review approximately 2800 in FY 1995 alone. Fifty-one states have agreements with USED and approved plans for FY 1993. The section 667.5 regulatory criteria parallel the statutory criteria found in Section 494C (b) and are problematical because they threaten to disproportionately target HBCUs for review based on essentially **neutral factors**. Although apparently neutral, these factors -- especially cohort default rates -- are perceived as indicating negatives with respect tot he institution's management of Title IV, Student Assistance. The regulatory criteria to be used by the Secretary to refer institutions for SPRE review may be summarized as follows:

(1) The institution has a cohort default rate (defined in 34 CFR 668.17) equal to or greater than 25 percent;

(2)(i) The institution has a cohort default rate (defined in 34 CFR 668.17) equal to or greater than 20 percent; and

(ii) During the latest completed award year for which data are available--

(A) More than two-thirds of the institution's regular undergraduate students who were enrolled as at least half-time students received assistance under any Title IV, HEA program, excluding assistance received from the SSIG, NEISP, and Federal PLUS programs; or

(B) The amount that the institution's students received under the Title IV, HEA programs, excluding funds from the SSIG, NEISP, and Federal PLUS programs, is equal to or greater than two-thirds of the institution's education and general expenditures;

(3) The amount that the institution's students received under the Federal Pell Grant Program is equal to or greater than two-thirds of the institution's education and general expenditures;

(4) The Secretary initiated a limitation, suspension, or termination action against the institution under 34 CFR part 668, subpart G, within the preceding 5 years;

(5) An audit finding in the institution's 2 most recent audits under 34 CFR 668.23 resulted in a required repayment by the institution of an amount greater than 5 percent of the funds the institution received under the Title IV, HEA programs for any 1 award year covered by those audits;

(6) The Secretary cited the institution for its failure to submit an acceptable audit report by the deadlines established under 34 CFR 668.23;

(7)(i) The amount that the institution's students received under the Federal Pell Grant Program during any award year differed by more than 25 percent from the amount that the institution's students received under the program in the preceding award year, unless the difference can be accounted for by changes in that program;

(ii) The amount that the institution's students received under the Federal Stafford Loan Program during any award year differs by more than 25 percent from the amount that the institution's students received under that program in the preceding award year, unless the differences can be accounted for by changes in that program; or

(iii) The amount that the institution's students received under the Federal SLS Program during any award year differs by more than 25 percent from the amount that the institution's students received under that program in the preceding award year, unless the differences can be accounted for by changes in that program;

(8) The institution failed to meet the factors of financial responsibility in 34 CFR part 668, subpart B;

(9) The institution underwent a change in ownership that resulted in a change of control as defined in 34 CFR 600.31;

(10) Except with regard to any public institution affiliated with a State system of higher education, the institution has participated for less than 5 years in--

(i) The Federal Pell Grant Program;

(ii) The FFEL Program;

(iii) The FSEOG Program;

(iv) The FWS Program;

(v) The Federal Perkins Loan Program; or

(11) the institution has been subject to a pattern of complaints from students related to its management or conduct of the Title IV, HEA programs or to misleading or inappropriate

advertising and promotion of the institution's educational programs that, in the Secretary's judgment, based on information available to the Secretary, including information provided to the Secretary by the SPRE, is sufficient to warrant review.

The Final Regulations did incorporate a new provision which allows the institution the opportunity to challenge the accuracy of information used to refer the institution to the SPRE for review, e.g. cohort default rate data. The Final Rule also limits the "complaints" referred to in the regulation to complaints filed by students, as opposed to faculty or staff members.

(II) STATE-INITIATED REVIEWS -- An even more troubling provision in the NPRM was the authority granted to a SPRE to initiate a SPRE review sua sponte, if the STATE "has reason to believe the institution is engaged in fraudulent practices." The Final Rules do not answer the question - What criteria under section 667.5 or section 494C of the Act, will the Secretary use in approving (or disapproving) within 21 days, a State's proposed review of an institution using criteria or information not **specifically** authorized by statute or regulation? In order to prevent State Postsecondary Review Entity (SPRE) abuse of the review authority granted by Congress to "review additional institutions which meet one or more of the criteria in 494(C)(b)," some limit on state-initiated reviews is needed.

There is a continuing concern, in the HBCU community, about the potential for arbitrary, unrestricted and unjustified inquiries, investigations, and intrusion into the internal affairs of HBCUs -- based on rumor, media bias or misinformation, or information provided by a disgruntled employee or student. The Final Rule attempts to circumscribe unilateral action by the SPREs by permitting an institution to challenge the accuracy of information that a SPRE uses to select an institution for review (section 667.6) -- when that review is initiated by the SPRE **without being referred by the Secretary.**

In challenging SPRE data or information used to initiate non-Secretarial-referred reviews, HBCUs should kept the following questions in mind:

* From what source will the SPRE acquire its "more recent data available to the State?";

* What did the SPRE use to determine the quality/validity of the data to be used, and determined its relevance to the criteria in question, e.g. was state guarantor cohort default rates used?;

* What evidence of a "fraudulent practice" shall be deemed persuasive?;

* Did the Secretary approve the SPRE's request to initiate a State review within "21 days?" or did the SPRE begin its review without receiving a response from the Secretary?

(III) DUE PROCESS -- The due process question has two manifestations in the Final Rule: (1) Secretarial imposition of critical due process requirements in the SPRE's final decision-making leading to termination; and (2) the need for statutory changes to modify the authority of the SPRE to terminate an institution **without Secretarial approval**.

Section 667.26 in the Final Rule contains two significant improvements which will benefit institutions, especially HBCUs. First, in addition to provision for a written statement of the SPRE's findings and decision to terminate contained in the NPRM, the SPRE will also identify a minimum time period during which the institution will be allowed to challenge the SPRE's determination. Second, and most importantly, a provision is included in the Final Rule allowing the institution to appeal the SPRE's decision -- in writing or in a hearing -- "before an impartial official designated by the State." This modification of the NPRM assures maximum due process at the state level, but does not cure the larger procedural problem of placing authority in the States to terminate institutions from a Federal program, with no Secretarial review.

(IV) ACCREDITING AGENCY ASSESSMENT OF NEW PROGRAMS -- The regulations in section 602.25 require accrediting agencies to assess any new or substantially changed program -- before including in in the accrediting agency's previous grant of accreditation. Under the Final Rule, the accrediting agency's definition of substantive change must include:

(1) Any change in the established mission or objectives of the institution;
(2) Any change in the legal status or form of control of the institution;
(3) The addition of courses or programs that represent a significant departure, in terms of either in the content or method of delivery, from those that were offered when the agency most recently evaluated the institution;
(4) The addition of courses or programs at a degree or credential level above that included in the institution's current accreditation or reaccreditation;

(5) A change from clock hours to credit hours or vice versa; and

(6) A substantial increase in--

o The number of clock or credit hours awarded for successful completion of a program; or

o The length of a program.

Implementation of these provisions over the past five years, for example, would have probably required both Clark Atlanta University and Knoxville College to secure Southern Association of Colleges and Schools (SACS) "approval" for the changes in their legal status when Clark College and Atlanta University **merged**, and when Knoxville College **acquired the assets** of Morristown College, respectively. Similarly, Middle States Association of Colleges and Schools and SACS would have been required to give prior approval for Morgan State University and North Carolina A & T State University to initiate their engineering programs.

(V) PROPOSED NEW **GENERAL PROVISIONS** REGULATIONS INTRUDE ON THE ACADEMIC INDEPENDENCE OF COLLEGES AND UNIVERSITIES -- The April 29, 1994 Federal Register contained Interim Final Regulations to the Student Assistance General Provisions. The Interim Final Regulations provided the higher education community with approximately sixty (60) days to comment. Three areas of particular concern to the HBCU community, and to the higher education community in general, because they purport to intrude the Federal Government into areas always left to institutions and their accrediting bodies in the past, include: (1) the establishment of a thirty (30) week academic year; (2) the creation of a federal standard for "withdrawal rates" which may be in conflict with the statewide withdrawal rates to be established by the State Postsecondary Review Entities (SPREs); and (3) the expansion of existing Satisfactory Academic Progress (SAP) standards beyond current application to Title IV recipients and the establishment of a federal graduation rate standard.

First, the Interim Final Regulations require colleges and universities to operate on a thirty week academic year. The Higher Education Technical Amendments of 1993 (P.L. 103-208) provide for a "waiver" that permits institutions whose academic year is less than thirty weeks to appeal to the Secretary. It is not clear from our reading of the Preamble, that the "good cause" waiver is properly addressed. The language of the Preamble suggests that the Secretary **will not** grant waivers to applicant institutions for more than two years. The language of the regulation itself appears to indicate that a waiver will be granted **automatically** if the applicant institution indicates that it is moving toward a thirty week academic year, however those institutions that do not indicate that they intend to move to the thirty week academic year -- will

have their cases decided on a case-by-case basis. Unfortunately, no specific criteria are provided in the regulation which would allow an institution seeking a "waiver" to determine on what basis the Secretary will make his/her determination (see Section 668.3, p. 22421).

Second, colleges and universities will already be required to comply with a statewide withdrawal rate, i.e. a minimum "acceptable percentage" established by the SPRE. The inclusion in the Administrative Capability Standard of a provision dealing with withdrawal rates introduces a new Federal quantitative standard in an area previously left solely to the institutions, the States, and some accrediting agencies. This requirement not only is potentially in conflict with State-established withdrawal rate standards, but it violates the clear language of Executive Order 12866 and section 103(b) of The Department of Education Organization Act (20 USC 3403). 10/

Third, the Interim Final General Provisions Regulations exceed the scope of the statute and greatly expand the federal requirements for measuring Satisfactory Academic Progress (SAP). The law requires that colleges and universities make certain that students, who receive Federal Student Assistance, meet SAP standards in order to continue to receive Title IV aid. At least fourteen (14) different requirements have been identified,11/ that institutions would have to implement in order to comply with the SAP regulations, appear in section 668.16(e). In addition to the intrusiveness of these requirements, many of them overlap and conflict. For example, institutions are required to make "a determination at the end of each increment...whether the student has successfully completed the appropriate percentage or amount of work according to the established schedule." Section 668.7, which is incorporated by reference into the Satisfactory Academic Progress regulations, requires institutions to "review the student's academic progress at the end of each academic year to determine that the student is making satisfactory academic progress at the end of that student's second academic year of attendance..."

The potential conflict and overlap is troublesome because many HBCUs have, in the past, maintained **two SAP policies** -- one for students receiving Title IV assistance and another for all other students. This was done, in many instances in order to further the equal opportunity goals of the Title IV program and the institution's "access" mission. Two institutional SAP policies compounded by conflicting Federal-State SAP requirements will almost certainly lead to audit exceptions and administrative problems between an institution's Registrar and Financial Aid Administrator.

Finally, the Administrative Capability Standards also establish a new federal graduation rate standard. Specifically, the new standard requires colleges and universities to establish a "maximum time frame" during which a student must complete his or her education. The standard is defined in the proposed regulation "for an undergraduate program, no longer than 150 percent of the published length of the educational program for a full-time student." Again the Department is exercising "... direction, supervision, or control over the curriculum, program of instruction, administration, ... of an educational institution..." in violation of section 103 (b). This intrusion is of particular concern to the HBCU community because of the outreach and access function performed by HBCUs and the educational deficits of many of their students. Remediation and academic reinforcement are necessary parts of the program of instruction because of the lack of academic preparation of many HBCU students.

The National Center for Educational Statistics (NCES) recently reported: "Between 1977 and 1990, the percent of students completing college within 4 years of graduating from high school **declined**, while **the percentage taking more than 6 years to graduate increased during that time**." 12/ NCES attributes this elongation of degree acquisition time to "changing schools or majors," and "stopping out or taking reduced course loads for financial, academic or social reasons." Since HBCUs enroll disproportionate numbers of lower income and minority students with academically deficiencies due to high school preparation, they are more likely to take longer to acquire a degree than their majority counterparts. 13/

(VI) INSTITUTIONAL REFUND POLICY -- The Higher Education Act Amendments of 1992, as amended, defines a fair and equitable refund policy as one that makes available to the illegible student the largest refund provided for: (1) under applicable State law; (2) by a requirement of a nationally recognized accrediting agency that is approved by the Secretary; or (3) by the pro rata refund calculation for qualifying students that is described in the statue. The Secretary has stated in the Interim Final Regulation that the individual calculation of all possible refunds for each withdrawing student is the only possible means that an institution can use to determine which refund calculation provides the largest possible refund to the student, as required by law.

Section 668.22 requires an institution to have a "fair and equitable refund policy" to any student "who receives Title IV, HEA program assistance;" or to a parent who received a federal PLUS on behalf of a student if the student -

> "(i) Does not registered for the period of enrollment for which the student was charged; or
>
> (ii) **Withdraws, drops out, takes an approved leave of absence, if expelled from the institution, or otherwise fails to complete the program on or after his first day of class of the period of enrollment for which he or she was charged."**

Colleges and universities are also required to provide a clear and conspicuous written statement of its refund policy and post and publish such notice where it can be easily seen by students.

As previously mentioned, "fair and equitable" has three components -- requiring an institution to refund unearned **tuition, fees, room and board, and other charges** of at least the larger of the amount determined by -- applicable state law, a refund standard established by the institution's nationally recognized accrediting body, or the pro rata refund calculation provided for in Section 668.22 (c). Subsection (c) states: "(1) 'Pro Rata refund', as used in this section, means a refund by an institution to a student attending that institution **for the first time** of not less than that portion of the tuition, fees, room, board, and other charges assessed the student by the institution equal to the portion of the period of enrollment for which the student has been charged that **remains on the withdrawal date**, rounded downward to the nearest 10% of that period, less any unpaid amount of a scheduled cash payment for the period of enrollment for which the student has been charged."

The specificity of this calculation is not only needlessly complex, but is intrusive and appears to extend beyond the intent of the law. In order to determine which calculation would benefit the student the most, institutions would have to do three calculations for every withdrawing student. In addition, institutions which experience a high rate of withdrawal -- through no fault of their own -- may experience cash flow difficulties in refunding substantial amounts of "unearned tuition, fees, room and board", etc. after having made full academic term commitments to faculty, staff and institutional vendors. The full impact of the refund policy must also be understood in conjunction with the "Reserve Fund Requirements."

(VII) RESERVE FUND REQUIREMENTS -- The Interim Final Regulations require all institutions participating in Title IV to maintain a reserve fund dedicated to reimbursing students who

withdraw from the institution. The regulation requires that the reserve fund **equal to 25 percent of the total volume of refunds paid by the college or university in the most recent academic year.** Thus, an institution which paid refunds of $300,000, would be required to maintain a reserve fund account of $75,000. The Interim Final provision is actually less stringent than the NPRM provision -- which would have required the institution to establish a specific refund account.

Due to the increasing severity of the refund requirements, i.e. required pro rata refunds to departing students based on their actual period of enrollment/class attendance prior to withdrawal, the potential for substantially-increased refund payments to students is great.

In conclusion, it is important for HBCU Presidents and their administrative staff to keep in mind the importance of state-level activity focused on securing favorable treatment of HBCUs by the SPRE. The Congress has delegated extraordinary regulatory and termination authority to each of the state designated agencies. while Secretarial approval of SPRE oversight plans and state review criteria, the specific content of those criteria and their ultimate impact on HBCUs, and their students, will be determined at the state level.

Several SPREs, most notably Mississippi and South Carolina, have been responsive and sensitive to HBCU concerns. In Mississippi, for example, the Mississippi SPRE has put **exempted HBCUs from being targeted as a result of high student loan default rates (based on their reading of the federal HBCU exemption!).** In South Carolina, the State Higher Education Executive Officer, who staffs the SPRE, has written to Secretary Riley requesting a "clarification" of how the federal HBCU exemption impacts the use of student loan default rates to target HBCUs for review by the SPRE.

Aggressive efforts by UNCF Presidents in both states contributed to these favorable actions. Even if you, or a member of your staff, are not on the SPRE, you should make your voice heard in the local decision-making process Secretarial approval of each states plan and review criteria is required by law. Last year, 47 states submitted plans to the Secretary. The Department expects to approve at least 51 plans from the states, the District of Columbia and Puerto Rico, and the outlying territories.

On June 24, 1994, the Career College Association (CCA) obtained a Temporary Restraining Order (TRO) 14/ prohibiting the Department of Education from implementing the Student Assistance General Provisions Interim Final Regulations as scheduled, 59 Fed. Reg. 22,348-22,459 (April 29, 1994) (to be codified at 34 C.F.R. 668, 682, and 690). Judge Thomas F. Hogan of the U. S. District Court for the District of Columbia issued his decision from the bench after hearing argument on the motion on the morning of June 24.

The June 24th TRO enjoins the entirety of the General Provisions, which include regulations governing academic weeks, institutional refunds and repayments, and standards of administrative and financial capability. The defendant, U.S. Department of Education, requested and obtained, on July 5, 1994 an Amended Order limited the scope of June 24th Order **to the "five-day academic week" provision (34 CFR 668.8(3)(b)(ii)) of the Interim Final Regulations**. 15/ The Department successfully argued to Judge Hogan that CCA's claim of irreparable injury extended only to the five-day academic week provision, and thus the relief should be limited to that provision.

While the decision was based on the Department's failure to comply with Master Calendar provisions, i.e. any regulation must be published in **final** form no later than December 1st prior to the award year when they are to be implemented. If the December 1 deadline is not adhered to, the implementation is delayed, by law, until the start of the second award year (see section 482(c) of the Higher Education Act. The plaintiff's Complaint did specifically reference the five-day academic week and the proposed test to determine asset-to-liability ratio. The regulations were to be enjoined until July 28, 1994, at which time the Judge was to make the injunction permanent or lift it entirely. The American Council on Education filed, on July 18, 1994 a Brief Amicus Curiae, associating itself and thirteen other higher education associations, including the National Association for Equal Opportunity in Higher Education (NAFEO) and the United Negro College Fund (UNCF), with the position of the plaintiff in opposition to violation of the Master Calendar provisions of the Higher Education Act.

A hearing was held on August 2, 1994 to decide the status of the TRO, at which time Judge Hogan promised to review the arguments presented and the Points and Authorities cited in extensive Memoranda filed by both parties forthwith.

William A. Blakey

ENDNOTES

1/ Section 322(2) of the Higher Education Act defines an "historically black college and university" as one "...that was established prior to 1964, whose principal mission was, and is, the education of Black Americans, ..." For further explanation and enumeration of the universe of Historically Black Colleges and Universities (HBCUs), see Historically Black colleges and Universities 1976-90, National Center for Education Statistics, Office of Educational Research and Improvement (OERI), U.S. Department of Education (NCES-92-640), July 1992.

2/ Part H, Program Integrity - TRIAD of Title IV of the Higher Education Act of 1965, as amended, was signed into law by the President on July 23, 1992 (P.L. 102-325) 20 USC 1099a established for the first time, statutory parameters for institutional oversight with respect to the administration of the Title IV, Student Assistance programs.

3/ See the January 24, 1994 (pp.3568-3601 and 3604-3623) and the February 10, 1994 (pp. 6446-6464) Federal Register for NPRMs on State Postsecondary Review (SPRE) and Accrediting Agency Recognition Criteria.

4/ 1993 UNCF Statistical Report, The United Negro College Fund, Hugh R. Fordyce, pp 23-24. Eighty-seven percent of all UNCF students receive some form of Title IV assistance.

5/ "The 1981 Statistical Report," UNITED NEGRO COLLEGE FUND, Maureen Burnley and Alan H. Kirschner, page 19 and "The 1991 Statistical Report," UNITED NEGRO COLLEGE FUND, Hugh R. Fordyce and Alan H. Kirschner, page. 19.

6/ See 1993 UNCF Statistical Report, page 26.

7/ "The Impact of Increased Loan Utilization Among Low Family Income Students," AMERICAN COLLEGE TESTING SERVICE, Thomas G. Mortenson, February 1990; "The Experience of the Stafford Loan Program and Options for Change," CONGRESSIONAL BUDGET OFFICE (CBO), Constance Rhind & Deborah Kalcevic, December 1991; and see also "Student Loans: Are They Overburdening a Generation?," THE COLLEGE BOARD, Janet S. Hansen, December 1986.

8/ "Reducing Student Loan Defaults -- A Plan for Action," U.S. Department of Education, Washington, D.C., page 7.

9/ "No One Runs The Place -- The Sorry Mismanagement of America's Colleges and Universities," Financial World, Katherine Barrett and Richard Greene, March 15, 1994, pp 38-45.

10/ Section 103 (b) of The Department of Education Organization Act states in relevant part "...(N)o provision of a program administered by the Secretary or by any other officer of

the Department shall be construed to authorize the Secretary or any such officer **to exercise any direction, supervision, or control over the curriculum, program of instruction, administration, or personnel of any educational institution, school or school system, over any accrediting agency or association, ...except to the extent authorized by law."** (Emphasis Supplied)

11/ See Letter dated June , 1994 from Robert H. Atwell to Wendy Macias and Greg Allen of the U.S. Department of Education commenting on the Interim Final General Provisions Regulations published in the April 29, 1994 Federal Register.

12/ The Condition of Education 1993, page .

13/ According to the American Council on Education Twelfth Annual Report on Minorities in Higher Education, while the graduation rate for Asian-Americans and Whites were 63% and 56%, respectively, only 32% of African-Americans earn a baccalaureate degree in six years. See also "1993 Statistical Report," The United Negro College Fund, Inc., Hugh R. Fordice, pages 11 and 23.

14/ See Career College Association, et. al., v. Richard W. Riley (Civ. Action No. 94-1372) ORDER, June 24, 1994.

15/ See Revised ORDER dated July 5, 1994.